Supreme Court, U.S.
FILED

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

DIANE YOUNG, WILLIAM HURSKIN,
AND CHARLES ANDERSON,
Petitioners,
VS.
LOCKHEED ADVANCED DEVELOPMENT COMPANY,
a division of Lockheed Corporation;
AND LOCKHEED CORPORATION,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Whether, for purposes of summary judgment, an employee who has established an inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, will necessarily have raised a genuine issue of material fact with respect to the legitimacy of the employer's articulated reason for its employment decision.

2. Whether the court of appeals erred in holding that an employee cannot base a claim of breach of contract or breach of the implied covenant of good faith and fair dealing on an employer's longstanding written human resources policies if the employer reserves the right to modify the policies as it deems necessary or appropriate.

3. Whether the court of appeals erred in holding that statements by a party that are "self-serving" are insufficient to raise an issue of fact to defeat a motion for summary judgment.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings.

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OPINIONS BELOW

There was no formal opinion of the district court. Excerpts of the transcript in that court, including the judge's statement in granting the motion for summary judgment, are reproduced in Appendix B to this petition.

The opinion of the court of appeals was not officially reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The opinion of the court of appeals was entered on April 8, 1998. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on May 14, 1998. (Appendix C.) The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Government Code § 12940(a).

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

STATEMENT OF THE CASE

This case involves employment discrimination suffered by petitioners of such a pervasive nature that the district court was compelled to comment that: "Is that an unacceptable work environment, of course it is, if true; any fool knows that. . . ." (Appendix A.) Unacceptable as the environment was, petitioners were nonetheless denied redress because of erroneous constructions by the district court and the appellate court of this Court's cases setting forth the tests for ruling on summary judgment motions in employment discrimination cases.

Petitioners are African American. They were all long term employees in the plant protection department of the security branch at Lockheed Corporation ("Lockheed"). Many of the jobs in said department required that the employee have not only a Department of Defense clearance but also a special "access" to a particular program, such as to the F-117A program or the U-2 program. More accesses mean more overtime opportunities and greater job security since the employee can be posted to a far greater number of locations.

For more than a decade each of the petitioners held a number of such accesses. Suddenly, in 1992 two of the petitioners had all of their accesses revoked without explanation. In 1993 the third petitioner was improperly terminated for a purported attendance problem, which termination was reversed after she filed a union grievance. Upon reinstatement, this petitioner was only reaccessed to one of the four programs to which she had previously been accessed.

After their accesses were revoked, each of the petitioners sought to have them restored. For literally years petitioners applied and submitted the necessary paperwork for accesses, only to be told repeatedly by Lockheed that their paperwork

had been "lost," which required new submissions, that there were changed requirements requiring additional documents that were not required of other employees or when they had obtained accesses in the past, or that new signatures were allegedly needed despite proof that only one submission and signature was ever needed. These excuses were consistent with uncontradicted evidence that such methods were traditionally used by management to delay or block employees' attempts to gain access.

As a result of petitioners' continuing inability to obtain accesses, on March 3, 1995 they filed suit in state court in California. Petitioners alleged that the termination of their accesses and their continuing inability to obtain new accesses was the result of racial discrimination in violation of the California Fair Employment and Housing Act ("FEHA"), California Government Code § 12940(a). Petitioners also alleged that Lockheed's arbitrary, capricious and discriminatory conduct constituted a breach of the policies and procedures promulgated by Lockheed regarding the terms of employment and a breach of the implied covenant of good faith and fair dealing.

Lockheed removed the action to federal court on the ground that the causes of action for breach of contract and breach of the implied covenant of good faith involved a federal question, namely, whether said causes were preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Thereafter, Lockheed moved for summary judgment.

Lockheed's motion for summary judgment was made on the grounds that petitioners lost their accesses for nondiscriminatory reasons, that the claims of two of the petitioners were barred by the statute of limitations and that the contract-related claims were barred because petitioners' employment was covered by a collective bargaining agreement. To support its claim of nondiscrimination, Lockheed

contended that it was the government that made the ultimate decision as to whether an employee was accessed to a particular program. Substantial evidence existed, however, that Lockheed, too, had the power to prevent the government from acting on petitioners' applications by merely disapproving the application or exercising other means of stopping the applications from even getting to the government. Lockheed produced no evidence that all of the access applications submitted by petitioners had been forwarded to or denied by the government.

The district court granted Lockheed's motion. Petitioners' evidence, including their own declarations and declarations, or deposition testimony, from 18 other current or former employees of Lockheed, consisted of direct and circumstantial evidence of pervasive, blatant and egregious racial animosity[1] and manipulation of the access process by the decisionmakers at Lockheed in charge of petitioners' access requests. Although the district court expressed disgust with Lockheed's conduct, the court nonetheless granted the motion, ruling that petitioners had not established a *prima facie* case of discrimination since petitioners failed to produce evidence that non-minorities were treated differently.[2]

---

[1]The extent and vileness of the racial animus was so great that the district court was moved to state that:

> [I]f Lockheed, with knowledge of this, is letting this kind of thing go on, they ought to be embarrassed, and some people's heads ought to roll.
>
> I'm not saying that is the truth of it, I'm just saying if those averments were proven, people that live in this town — and I swear I think people who live in this century — have no business tolerating that, doing it or tolerating it. (Appendix B.)

Although granting summary judgment, the district court suggested that Lockheed should apologize to petitioners and voluntarily give them money.

[2]The district court did not address the statute of limitations' argument or the contract-based causes of action during the course of its ruling.

The court of appeals held that there was no such requirement, and determined that petitioners Diane Young and William Hurskin had set forth a *prima facie* case of discrimination.

> Young and Hurskin offered evidence that they are members of a protected class, that they were accessed to a number of programs for over ten years, that their accesses were revoked, that there were substantial delays in Lockheed's processing of their applications for accesses, that managers at Lockheed had interfered in the past with the processing of access applications, and that managers who had the ability to interfere with accessing procedures had expressed or condoned racial bias and racially biased practices at Lockheed. *These facts in combination are sufficient to raise an inference that plaintiffs' difficulties with their security accesses were the result of discrimination.* (Appendix A.) (Emphasis added.)

Although determining that petitioners Young and Hurskin had set forth a prima facie case of unlawful discrimination through direct and circumstantial evidence of discrimination, rather than through the presumption set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) erroneously applied by the district court, the appellate court nonetheless held that petitioners had not produced sufficient evidence to establish that Lockheed's purported justifications were pretextual. Thus, the appellate court accepted Lockheed's explanation that said petitioners' difficulties in being reaccessed to the programs could have been the result of adverse information in their background or, regarding Hurskin, the result of Hurskin's failure to complete all of the paperwork for one program. According to the appellate court, petitioners offered only "general and con-

clusory" evidence of racism and Lockheed's ability to delay or deny accesses.[3]

Regarding the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, the appellate court ruled that such claims could not be based on Lockheed's Human Resources Directives because Lockheed's reservation of the right to modify or alter them at its discretion made their binding force "minimal."

As for petitioner Anderson, the appellate court ruled that Anderson's uncorroborated declaration that he timely filed an administrative claim with the California Department of Fair Employment and Housing ("DFEH"), a prerequisite to filing a civil action under the FEHA, was insufficient as a matter of law to counter a declaration from the DFEH that it had no record of such a filing.

REASONS FOR GRANTING THE WRIT

In this case the Ninth Circuit has erected new and serious impediments to workers seeking redress for unlawful discrimination. Although petitioners established a *prima facie* case by direct and circumstantial evidence of a discriminatory motive by their management in regard to the conduct under scrutiny, the appellate court refused to hold that such evidence necessarily created an issue of fact as to whether Lockheed's purported justification for its conduct was pretextual.

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[3]This was stated despite petitioners' presentation of eyewitness testimony from another plant protection officer that Lockheed's chief of plant protection, who had the power to disapprove petitioners' applications, called black persons "niggers" and "black motherfuckers" while at work, and despite the declaration from a Lockheed access processor that her boss would tell her to shelve applications and lie to employees about why they had not been accessed.

Also, the appellate court nullified established law in California by holding, sua sponte, without reference to any authority, that an employee cannot proceed against an employer on claims for breach of contract or breach of the implied covenant of good faith and fair dealing based on longstanding written human resources policies promulgated by the employer where the employer reserves the right to modify the policies.

Finally, the appellate court created, again on its own without the issue being raised by respondents, a new ground for disregarding evidence when considering a motion for summary judgment. According to the court of appeal, opposing evidence that is "self-serving" and uncorroborated cannot create an issue of fact. The conclusion is unprecedented and without logical support, and it undermines the policy favoring employees proceeding in discrimination cases where the elusive element of intent is in issue.

I.

AN EMPLOYEE WHO HAS ESTABLISHED A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION BY MEANS OF ACTUAL EVIDENCE OF RACIAL ANIMUS BY THE DECISIONMAKER HAS NECESSARILY CREATED AN ISSUE OF FACT AS TO WHETHER THE EMPLOYER'S PROFFERED REASONS FOR ITS CONDUCT ARE PRETEXTUAL.

In order to prevail on summary judgment in a disparate treatment discrimination case, an employee must demonstrate that the employer had a discriminatory intent or motive in carrying out the employment decision. Thus, in a race discrimination case the employee must be able to raise an inference that the decisionmaker's conduct was contributed to by racial discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *McDonnell*

Douglas, supra. Typically this is done by a three-step process whereby the employee establishes a prima facie case of discrimination, which can be established even in the absence of any direct or circumstantial evidence of a discriminatory intent, with the burden of production then shifting to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. *Burdine* at 253-254. If the employer does so, then the plaintiff must demonstrate that the reason was pretextual. *Id.* at 256.

In the usual circumstances, an employee establishes a *prima facie* case by satisfying the four-part test of *McDonnell Douglas,* thereby relying on a presumption of discrimination. However, the employee can establish an inference of discriminatory motive by actual evidence, either direct or circumstantial. *McDonnell Douglas,* 411 U.S. at 802, n. 13; *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977); *Lowe v. City of Monrovia,* 775 F.2d 998, 1009 (9th Cir. 1985).

Here, the court of appeals correctly concluded that petitioners had set forth a *prima facie* case of discrimination by means of actual evidence of discriminatory intent. The evidence demonstrated that management in petitioners' branch, including those decisionmakers in control of the access process with whom petitioners had to contend, routinely referred to blacks as "niggers" and "black motherfuckers," told "nigger" jokes, condoned or accepted such conduct in subordinates (i.e., petitioners' coworkers) and clustered blacks in lower echelon jobs. The court of appeals also agreed that the evidence showed that these same management personnel would pull accesses previously given to employees and/or prevent employees from obtaining accesses at management's sole discretion, routinely lying all the while about the reasons the employee was not accessed. The ways in which this deception and manipulation was practiced mirrored the manner in which petitioners

were treated regarding their attempts to regain their accesses.

Despite petitioners' establishment of a *prima facie* case of discrimination by direct and circumstantial evidence, the appellate court considered Lockheed's purported reasons and then determined that petitioners had not presented "any evidence" that Lockheed's reasons were pretextual and that the evidence did not create a "genuine" issue of fact regarding the reasons for their not being accessed.[4] In so ruling, the appellate court disregarded the very evidence that established that the decisionmakers had the ability and discriminatory motive to engage in unlawful discrimination, and instead, in effect, required that petitioners produce additional evidence to establish discriminatory intent.

The court of appeals erred. This Court has held that evidence that establishes a *prima facie* case is to be considered in determining whether the employer's proffered reason for its conduct is pretextual, and that the ultimate purpose of such evidence is to determine if a discriminatory intent

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[4]With respect to Young, the court accepted Lockheed's position that the presence of adverse information in her background might have explained her failure to be reaccessed to two programs, dismissing out of hand Young's evidence that Lockheed had the means and the opportunity to delay and deny accesses without even submitting the paperwork to the government. Similarly, the appellate court stated that Hurskin's evidence "regarding Lockheed managers' ability to interfere with the accessing process and evidence of racism in Lockheed's management ranks" was somehow insufficient to create an issue of fact regarding the processing of his accesses given the presence of adverse information in his background. In fact, petitioners had specific, first-hand declarations or testimony detailing Lockheed's custom of wrongfully preventing access requests from even being submitted to the government as to certain employees. Although not material to petitioners' position herein, petitioners disagree that no evidence was presented or that a genuine issue of fact was not created by such evidence *even if petitioners had not produced evidence of actual bias.*

exists. See, e.g., *Burdine,* 450 U.S. at 253, 255, n. 10. The appellate court manifestly erred in granting summary judgment when petitioners' evidence had established that there was "an inference that plaintiffs' difficulties with their security accesses were the result of discrimination." (Appendix A.) Having established this, petitioners created an issue of fact as to whether Lockheed discriminated against them which could only be decided by a trier of fact.

Moreover, since petitioners established a *prima facie* case by *actual evidence of discriminatory motive and intent,* and not by the *McDonnell Douglas* presumption, petitioners submit that they *necessarily* created an issue of fact whether the reasons advanced by Lockheed were pretextual. Furthermore, petitioners submit that the policies underlying the manner in which courts are to approach discrimination cases in summary judgment motions mandate that once a plaintiff establishes an inference of discrimination by the decisionmaker by actual evidence, either direct or circumstantial, such inference necessarily precludes summary judgment.

The employer's intent to discriminate is a pure question of fact, and it is ordinarily one to be left to the trier of fact. *Pullman-Standard v. Swint,* 456 U.S. 273, 287-288; *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716 (1983). Because of this, and because of the inherent difficulty in discovering true motives, petitioners submit that an employee who can demonstrate an actual discriminatory animus on the part of a decisionmaker[5], such

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[5]Obviously, the bias of a manager is not important where the decision in issue is prescribed by objective or external criteria. Such is not the case here, where management controlled the processing, approval and submission of the access requests.

as petitioners did, should be allowed to proceed to trial. As the court in Lowe stated:

> When a plaintiff does not rely exclusively on the presumption but seeks to establish a *prima facie* case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive — including evidence as diverse as "the [defendant's] treatment of [plaintiff] during his prior term of employment; [defendant's] reaction, if any, to [plaintiff's] legitimate civil rights activities; and [defendant's] general policy and practice with respect to minority employment," (cite) — may suffice to raise a question that can only be resolved by a factfinder. Once a *prima facie* case is established either by the introduction of actual evidence or reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the "elusive factual question of intentional discrimination," (citing *Burdine,* 450 U.S. at 255, n. 8). *Lowe,* 775 F.2d at 1009.

The court in *Lowe* went on to hold:

> Moreover, when a plaintiff has established a *prima facie* inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision. *Id.* at 1009.

To hold otherwise would require a plaintiff to not only provide evidence that the employer had a discriminatory intent through direct or circumstantial evidence, but also place the plaintiff in the almost impossible position of

producing evidence of what the wrongdoer's actual state of mind was when he or she made the employment decision under scrutiny. Thus, in this case, petitioners, whom the court of appeals agreed produced sufficient evidence to show that their management was racist and historically engaged in conduct of the type to which petitioners were continuing to be subjected in order to delay or prevent accesses, cannot have a trier of fact decide the case because these demonstrably racist managers deny that their true motive was other than legitimate. Under such circumstances, ascertainment of the employer's true motive is necessarily a matter for trial, where cross-examination and credibility can help sort out the truth.

Petitioners suggest that the court of appeals' approach reverses traditional policy considerations. In effect, under the appellate court's approach persons claiming unlawful discrimination are penalized in summary judgment proceedings because the wrongdoer will always present a later rationalization for the conduct in question, but will never admit to the actual discriminatory impetus. Where, as here, a discriminatory impetus on the part of the decisionmaker has been demonstrated, summary judgment in favor of the employer contravenes the important policies against unlawful discrimination.

Where the decision to be made is within the discretion of a manager and the evidence establishes that the manager is racist, it is absurd to grant summary judgment merely because the manager claims that he had good reasons for his decision. The contribution of his racist views versus the impact of his "good reasons" can only be resolved by a trial, and not by means of a motion for summary judgment.

II.

THE APPELLATE COURT CONTRAVENED ESTABLISHED CALIFORNIA LAW REGARDING CONTRACTS.

Petitioners presented claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Lockheed asserted that these claims were not preempted by the LMRA because they were based on Lockheed's written Human Resources Directives ("HRD").

Although Lockheed never contended that its HRD did not constitute a contract, the appellate court ruled that summary adjudication of these claims was proper because petitioners had not established that the HRD constituted a contract between Lockheed and its employees. According to the court of appeals, the binding force of the HRD was "minimal" because Lockheed reserved the right to modify, rescind or revise the provisions at its sole discretion. The appellate court never explained how a contract can have a binding effect which is "minimal," nor did it cite any authority for its position. In fact, the appellate court's conclusion is contrary to California law, which is controlling in this case (*Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 733, 735 (9th Cir. 1986)).

In California a contract is not rendered illusory merely because it provides one party with discretionary power to vary the performance or the rights of the other party. First, California holds that any discretion afforded a party must be exercised in good faith, and hence such discretion is impliedly limited as a matter of law. *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 923, 216 Cal.Rptr. 345; *Powell v. Central California Federal Savings & Loan Association* 59 Cal.App.3d 540, 549, 130 Cal.Rptr. 640; *Okun v. Morton* (1988) 203 Cal.App.3d 805, 820, 250 Cal.Rptr. 220.

Second, a party's discretionary power does not render an agreement illusory "if the party's *actual* exercise of that power is reasonable." *Powell, supra,* 59 Cal.App.3d at 549 (emphasis in original). See also *Perdue, supra,* 38 Cal.3d at 923.

Here, Lockheed's actual power to vary its HRD is thus limited by the duty of good faith and fair dealing. Moreover, Lockheed, which never even raised this issue, provided absolutely no evidence that it changed the applicable directives. This was an invention of the court of appeals.

Hence, the court of appeals' decision was in contravention of the law.

III.

THE COURT OF APPEALS ERRED IN REJECTING EVIDENCE ON THE GROUNDS THAT IT WAS UNCORROBORATED AND SELF-SERVING.

Under California law, in order to maintain a civil action for discrimination based on a violation of the FEHA, a plaintiff must first have filed an administrative complaint with the DFEH. California Government Code § 12960; *Denney v. Universal City Studios, Inc.,* (1992) 10 Cal.App.4th 1226, 1232, 13 Cal.Rptr.2d 170. The administrative complaint must have been filed within one year of the discrimination. California Government Code § 12960.

Lockheed produced a declaration from the DFEH that it had no record of petitioner Charles Anderson filing an administrative complaint with it. Anderson, on the other hand, provided a declaration in which he stated that he did file one.

The appellate court held that Anderson's uncorroborated declaration was insufficient to raise a genuine issue of whether such a complaint was filed, relying on *Johnson v.*

Washington Metropolitan Transit Authority, 883 F.2d 125, 128 (D.C. Cir. 1989) and cases cited therein. The court's position was that a self-serving uncorroborated declaration could not create a genuine issue of fact.

The appellate court's holding is unsupported by law and is unsound. *Johnson* and the cases cited therein stand for the proposition that a plaintiff's self-serving declaration cannot alone create an issue of fact if there exists "persuasive evidence that the plaintiff has deliberately committed perjury." *Johnson,* 883 F.2d at 128.

Here, there was absolutely no claim of, much less any evidence of, perjury. The DFEH, which undoubtedly receives thousands of complaints, provided a declaration that it could not find Anderson's complaint. Clearly, the DFEH's failure to find the complaint cannot be deemed conclusive that none was filed, and thus is not persuasive evidence that Anderson committed perjury.

Moreover, the appellate court's position is illogical and would wreak havoc in any summary judgment situation. A party's declaration is undoubtedly self-serving in every case. A rule that such evidence must be corroborated to create a genuine issue of material fact would graft a new requirement virtually eliminating the ability of responding parties to defeat a motion for summary judgment.

CONCLUSION

The summary judgment should be reversed.

Date: August 11, 1998

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APPENDIX A

No. 96-56643

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE YOUNG, WILLIAM HURSKIN, and CHARLES ANDERSON,
Plaintiffs-Appellants,
v.
LOCKHEED ADVANCED DEVELOPMENT CO., a division of Lockheed Corporation; and LOCKHEED CORP., a Corporation,
Defendants-Appellees.

Filed April 8, 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DC No. CV-95-2231-JSL

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge presiding

Argued and Submitted March 2, 1998
Pasadena, California

Before: Wiggins and Kleinfeld, Circuit Judges,
and Smith, District Judge**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Fern M. Smith, District Judge for the Northern District of California, sitting by designation.

Diane Young, William Hurskin, and Charles Anderson ("appellants") appeal the district court's grant of summary

judgment in favor of their employer, Lockheed Co., on three claims arising from the termination of their security accesses: 1) racial discrimination in violation of the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940; 2) breach of contract; and 3) breach of the covenant of good faith and fair dealing.

Appellants contend that the district court erred in granting summary judgment on their FEHA claims on the ground they failed to establish a prima facie case of discrimination. They also contend that the district court erred in granting summary judgment on appellants' claims for breach of contract and breach of the covenant of good faith and fair dealing on the ground that these claims were preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I. FEHA Claims

A. Anderson's Claim

Filing a timely charge of discrimination with the California Department of Fair Employment and Housing ("DFEH") is a jurisdictional prerequisite to the filing of an action for damages under FEHA. *See Cal. Gov't. Code* § 12960. Plaintiffs have one year from the date of the alleged violation in which to file charges with DFEH.

DFEH has no record of any charges filed by Anderson prior to filing this action. Anderson's own uncorroborated and very generalized testimony that he filed a claim with DFEH prior to filing this action is not sufficient to raise a genuine issue as to whether or not he filed a claim. *See Johnson v. Washington Metropolitan Transit Authority,* 883 F.2d 125, 128 (D.C. Cir. 1989) (discussing cases in which self-serving testimony uncorroborated by other evidence did not create a genuine issue of material fact). Anderson has acquired a right to sue letter from DFEH since filing this

action, but his belated filing does not cure the jurisdictional defect in the present action. Summary judgment as to Anderson's claim was proper.

B. Young and Hurskin

California looks to federal employment discrimination law when analyzing FEHA discrimination claims. *Levy v. Regents of the Univ. of California,* 199 Cal.App.3d 1334, 1343; 245 Cal.Rptr. 576, 581 (1988). In order to establish a case of employment discrimination, a plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its action. In order to prevail, the plaintiff must demonstrate that the employer's alleged reason for its action is a pretext for a discriminatory motive. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973); *Lowe v. City of Monrovia,* 775 F.2d 998, 1004-05 (9th Cir. 1986), amended on other grounds, 784 F.2d 1407; *Diaz v. American Telephone & Telegraph,* 752 F2.d 1356, 1358-59 (9th Cir. 1985).

In order to establish a prima facie case of discrimination, a plaintiff must offer evidence that "gives rise to an inference of unlawful discrimination." *Lowe,* 775 F.2d at 1004-05. The district court ruled that plaintiffs had failed to establish a prima facie case because they had not provided evidence that non-minority employees were treated differently. Plaintiffs argue that such a showing is not required. Plaintiffs are correct.

There is no hard and fast rule regarding the particular type of evidence plaintiffs are required to adduce in order to establish a prima facie case of discrimination. Although courts routinely apply the four-part test set out in *McDonnell Douglas,* a plaintiff may attempt to raise an inference of

discrimination "in whatever manner is appropriate in the particular circumstances." *Diaz,* 752 F.2d at 1361.

> "Any indication of discriminatory motive — including evidence . . . [about defendant's] 'general policy and practice with respect to minority employment' — may suffice to raise a question that can only be resolved by a factfinder." *Lowe,* 775 F.2d at 1009 (internal citations omitted).

Evidence that similarly situated non-minority employees were treated differently is not required. *See Diaz,* 752 F.2d at 1360-61 (holding that the promotion of a member of plaintiff's class to the position plaintiff was seeking did not preclude plaintiff from establishing a prima facie case if he could show other facts raising an inference of discrimination).

Young and Hurskin offered evidence that they are members of a protected class, that they were accessed to a number of programs for over ten years, that their accesses were revoked, that there were substantial delays in Lockheed's processing of their applications for accesses, that managers at Lockheed had interfered in the past with the processing of access applications, and that managers who had the ability to interfere with accessing procedures had expressed or condoned racial bias and racially biased practices at Lockheed. These facts in combination are sufficient to raise an inference that plaintiffs' difficulties with their security accesses were the result of discrimination. Young and Hurskin have therefore established a prima facie case. The district court erred in granting summary judgment on the ground that they failed to do so.

Because this court is reviewing a district court's grant of summary judgment, it must examine the record to determine if there is any other basis for affirmance. *Diaz,* 752 F.2d at 1362; *Lowe,* 775 F.2d at 1007. If the result below

was correct, a reviewing court can affirm even if the court below relied on an erroneous ground. *Lowe,* 775 F.2d at 1007.

1. Young's Claim

Lockheed offered evidence that Young's accesses were revoked in 1993 because she was terminated in accordance with Lockheed's standard policies and practices. Young has not presented any evidence suggesting that Lockheed's explanation for the revocation of her accesses following her termination was pretextual.

With regard to Young's difficulties regaining her access to the V program, Lockheed offered evidence that at the time of her application, the V program was only processing limited numbers of access applications pursuant to instructions from the government. Young's manager Abby Rothman did not submit a program access request ("PAR") on her behalf because the CBA required Rothman to submit PAR's for other officers with more seniority. Young has failed to create a genuine issue of fact as to whether this explanation is pretextual. Her vague recollection of other employees' employment statuses is insufficient to undermine Lockheed's evidence that the CBA mandated that these officers precede Young in getting accesses when accesses were limited.

Young offered general and conclusory evidence that Lockheed had the means and the opportunity to delay or deny accesses without ever submitting paperwork to the government. Given the presence of adverse information in Young's record, none of this evidence raises a genuine issue of fact regarding Lockheed's motives. Summary judgment on Young's claim was proper.

2. Hurskin

Lockheed offered evidence that Hurskin's accesses were revoked in 1992 because the government had informed Lockheed that Hurskin did not meet the criteria for security accesses. Hurskin has presented no evidence indicating that the revocation of his security accesses in 1992 was based on anything other than the government's letter.

With regard to Hurskin's difficulties regaining access to secured programs, Lockheed offered evidence that Hurskin's record contained adverse information, including a reckless driving conviction and financial difficulties, and that Hurskin had failed to complete all of the required paperwork for the K program. Lockheed also offered evidence that in November 1995, Abby Rothman submitted a letter to the K program security office attesting to Hurskin's usefulness to the program.

With respect to his difficulties getting re-accessed, Hurskin has only presented general evidence regarding Lockheed managers' ability to interfere with the accessing process and evidence of racism in Lockheed's management ranks. Given the presence of adverse information in Hurskin's record, this evidence is insufficient to create a genuine issue of fact regarding the processing of Hurskin's access requests. The district court's decision to grant summary judgment on Hurskin's FEHA claim was therefore proper.

II. Contract-based claims

Appellants' employment relationship with Lockheed is governed by a CBA. Any claims based on the CBA are preempted by the LMRA. *Chmiel v. Beverly Wilshire Hotel,* 873 F.2d 1283, 1285-86 (9th Cir. 1989).

Appellants argue that their contract-based claims are exempt from LMRA preemption because they are based on Lockheed's Human Resources Directives ("HRD") and

not on the CBA. Appellants have not established, however, that the HRD constitutes a contract between Lockheed and its employees. Given that there is a CBA governing the employment relationship here and that Lockheed has reserved the right in the HRD to "modify, supplement, rescind, revise, or otherwise alter any provision of any policy as it deems necessary or appropriate at its sole discretion," the binding force of the HRD appears to be minimal. Appellants' contract-based claims therefore lack any legal basis. Summary Judgment was proper.

AFFIRMED.

APPENDIX B

CV-95-2231-JSL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE J. SPENCER LETTS,
PRESIDING UNITED STATES
DISTRICT COURT JUDGE

DIANE YOUNG, et al.,
Plaintiffs,

vs.

LOCKHEED ADVANCED DEVELOPMENT,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Monday, September 9, 1996
Los Angeles, California

Motion for Summary Judgement

Terry Kramer, CVR
Official Reporter
United States District Court
419 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 680-1908

Appearances:

For the Plaintiffs:

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BY: Jeffrey McIntyre
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BY: Eric Emanuel
Attorney at Law

* * *

THE COURT: Here's what it looks like to me.

You haven't really stated a prima facie case in classic terms because you haven't put any nonminority person in similar circumstances; you haven't even alleged that anybody is ever going to be in similar circumstance.

The plaintiffs individually, it appears pretty clear why they're upset and that they have a right to be upset, and, my goodness, if Lockheed, with knowledge of this, is letting this kind of thing go on, they ought to be embarrassed, and some people's heads ought to roll.

I'm not saying that is the truth of it, I'm just saying if those averments were proven, people that live in this town — and I swear I think people who live in this century — have no business tolerating that, doing it or tolerating it.

That is so clear that right now I continue to doubt it a little bit, but it doesn't matter, they can't have that.

Is that an unacceptable work environment, of course it is, if true; any fool knows that, we're not arguing about that.

The trouble is that you can't make the connection between the work environment and the actions taken, and you haven't. I don't think you can sustain a cause of action for what you have proven.

MR. McINTYRE: If I may, Your Honor, our position would be — and I don't think it's out of line — that the matters alleged as what occurs, for example, the necessity that someone have to sign their paperwork because they're told —

THE COURT: No, you've not shown me a single circumstance where the initiative came either from the government, which it didn't, two of your three circumstances, or started with a termination.

That's why I feel so badly for your people, all the things that were happening that they thought there was everybody else around and they thought all of these things ought to be happening in the ordinary course and they weren't, and they kept saying to themselves, there's something wrong here, what can it be, well, it's all these miserable people that behave so badly and they're doing it to me, I don't blame them for thinking that, I'd have thought that, too.

Those letters, both of them, one of them directly and the other one indirectly, both say you can't tell them, so you're sitting there with people that don't know what's happening but it's happened.

MR. McINTYRE: Your Honor if I may, the one letter states that in fact the person is to be advised of their rights in regard to Mr. Hurskin.

Paragraph 2 states, *Either something is to be done to see that it gets taken care of, or he is to be informed of that.* That's not our only issue, though, Your Honor.

We are claiming — it is our position — that the continued failure to obtain access, which people can get even if they've been turned down once —

THE COURT: No; no, that's different. Two of these people had access, they got terminated.

Mr. McINTYRE: One was terminated, two had financial troubles.

THE COURT: Two were terminated. There are letters from the government directing Lockheed, take these people off the access. You've not shown a single comparable circumstance to that.

Of course people get access. It's very different from when the government says, I want access denied, and the government said it.

Mr. McINTYRE: Your Honor, I understand that.

The problem lies in that the persons have attempted to again gain access and there's —

THE COURT: And you —

Mr. McINTYRE: — no person they can — they've even gotten —

THE COURT: Forgive me, but it's better if while I'm talking you stop, even though I'm interrupting you.

Mr. McINTYRE: I apologize.

THE COURT: It doesn't matter.

It may be that there is an ordinary course of what it takes to get access. You haven't alleged and you haven't an ability to allege because you don't have the ordinary prima facie case.

You don't have a single instance or even a thought of an instance that when the government took the initiative first and said, I want this person out, that there's an ordinary

course about how you get back in, there's not an instance of that.

There is not an instance anywhere in your papers that if a person, subject to grievance proceedings, is terminated, what happens when they're reinstated.

And to suggest that what happens with people that are not terminated or have not had the government take the initiate is what should be looked at, I don't think so.

MR. McINTYRE: If I may, Your Honor —

THE COURT: You're going to have to be very quick, because that's a ruling, actually.

MR. McINTYRE: Well, if that's the ruling, I do believe that in fact these people got their access back in some instances. Even Ms. Young got her access back in one instance. She has not received a number of the other —

THE COURT: And if I were on the other side, I would jump up right this second — except I'm winning, so I wouldn't — and say, I rest my case. It's not an across-the-board denial.

MR. McINTYRE: But she's not getting —

THE COURT: Of course not.

MR. McINTYRE: That only —

THE COURT: And not only that, she hasn't alleged any; none of them have really alleged any actual damages, but it doesn't matter, I didn't get that far. They haven't alleged anybody in comparable circumstances; they have to.

I say again, whether they have some causes of action they haven't brought, I have no opinion, but if what I read is true — and you may quote me — if it's true and those people know it, that's an outrage and they ought to be embarrassed and these people should be apologized to, they

should get them in there and say, gee, we couldn't tell you, we didn't think we could tell you, here's what happened, and we're sorry.

And maybe they ought to just give them some money as volunteers. This is awful, I'm sorry you had your feelings hurt so badly, it's terrible, and we want to do something to make it right with you.

I don't think it's ever going to happen that some court is going to tell them they have to, that's different, not on these pleadings. And I'm not at all sure there are any pleadings that you could get to, not while they're on the payroll.

MR. McINTYRE: Thank you, Your Honor.

APPENDIX C

No. 96-56643

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE YOUNG; WILLIAM HURSKIN;
CHARLES ANDERSON,
Plaintiffs-Appellees,

v.

LOCKHEED ADVANCED DEVELOPMENT COMPANY,
a division of Lockheed Corporation;
LOCKHEED CORPORATION, a Corporation,
Defendants-Appellants.

Filed May 14, 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DC No. CV-95-2231-JSL

ORDER

Before: WIGGINS and KLEINFELD, Circuit Judges, and SMITH*, District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judge Kleinfeld has voted to reject the suggestion for rehearing en banc, and Judges Wiggins and Smith have recommended the same.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

** The Honorable Fern M. Smith, United States District Judge for the Northern District of California, sitting by designation.